

The Honorable Ricardo S. Martinez

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE**

COLUMBIA RIVERKEEPER, IDAHO )  
RIVERS UNITED, SNAKE RIVER )  
WATERKEEPER, PACIFIC COAST )  
FEDERATION OF FISHERMEN'S )  
ASSOCIATIONS, and THE INSTITUTE )  
FOR FISHERIES RESOURCES, )

Plaintiffs, )

v. )

ANDREW WHEELER, *et al.* )

Defendants. )

No. 2:17-cv-00289-RSM

**PLAINTIFFS' OPPOSITION TO  
EPA's MOTION TO EXTEND  
DEADLINE (ECF No. 40)**

(For Consideration November 2, 2018)

Plaintiffs Columbia Riverkeeper *et al.* file this opposition to Defendants' (EPA's) Motion (ECF No. 40) to extend the 30-day deadline to review the constructively submitted temperature TMDL for the Columbia-Lower Snake River. The Clean Water Act (CWA) requires EPA to review and either approve or disapprove of a submitted TMDL within 30 days; after a disapproval, EPA must issue a TMDL within another 30 days. 33 U.S.C. § 1313(d)(2). In its Order (ECF No. 39), the Court found a constructive submission and ordered EPA to comply with these back-to-back 30-day statutory deadlines. While Plaintiffs look forward to working with EPA to agree to a reasonable deadline for the second step (issuing the TMDL), Plaintiffs oppose EPA's attempt to delay the process from the outset.

PLAINTIFFS' OPPOSITION TO EPA's  
Motion To Extend Deadline  
(No. 2:17-cv-00289-RSM) – 1

ADVOCATES FOR THE WEST  
P.O. Box 1612  
Boise, ID 83701  
(208) 342-7024

1 In support of its Motion, EPA says it needs more than 30 days to go through DOJ and  
2 EPA processes to decide whether to pursue an appeal and/or how to issue an approval or  
3 disapproval of the TMDL. However, EPA knew this situation could arise—or should have  
4 known this—all along, and EPA could have easily avoided the problems it now claims to face.

5 First, when the parties briefed remedies, EPA could have asked for more than 30 days to  
6 review the TMDL, but it never did. The parties agreed to brief liability and remedies together in  
7 summary judgment briefing. *See* ECF No. 14. In its summary judgment briefing, EPA argued  
8 that if there was a constructive submission, then the Court should order EPA to review and  
9 approve or disapprove the TMDL as required under the CWA. *EPA Opening Br.* (ECF No. 31),  
10 pp. 47–50 And this is precisely what the Court ordered. EPA cannot now claim this remedy is  
11 inappropriate.

12 Second, since this was the remedy EPA asked for, EPA should have prepared in advance  
13 to comply with the remedy. EPA proposed this remedy as far back as November 3, 2017. *See*  
14 *id.* For about a year leading up to the Court’s Order, EPA and its counsel could have prepared  
15 for this foreseeable outcome, including by considering whether to appeal or how to review and  
16 approve or disapprove the submission of no TMDL, but they never did so.

17 EPA also argues that the Court should extend the deadline so the Parties can have the  
18 opportunity to try to reach an agreement on deadlines. Plaintiffs look forward to having  
19 discussions with EPA to try to agree to a reasonable deadline for EPA to take step two in the  
20 Court’s Order (the more complicated task of issuing a TMDL). These discussions can occur any  
21 time, and there is no need to delay step one (the simple task of reviewing no TMDL).

22 In sum, EPA asked for the very situation from which it now seeks relief; yet EPA claims  
23 to be caught completely off guard. The Court should deny EPA’s request and should keep the  
24 first 30-day deadline in place.

1 RESPECTFULLY SUBMITTED this 31st day of October, 2018.

2 By: /s/ Bryan Hurlbutt  
3 Bryan Hurlbutt (*pro hac vice*) (ISB #8501)  
4 ADVOCATES FOR THE WEST  
5 P.O. Box 1612  
6 Boise, ID 83701  
7 (208) 342-7024 x206  
8 bhurlbutt@advocateswest.org

9 Miles Johnson (WSBA #50741)  
10 COLUMBIA RIVERKEEPER  
11 111 Third St.  
12 Hood River, OR 97031  
13 (541) 490-0487  
14 miles@columbiariverkeeper.org

15 Richard A. Smith (WSBA # 21788)  
16 SMITH & LONEY, PLLC  
17 2317 East John St.  
18 Seattle WA 98112  
19 (206) 860-2883  
20 richard@smithandloney.com

21 *Attorneys for Plaintiffs*

22 **CERTIFICATE OF SERVICE**

23 I hereby certify that on October 31, 2018, I electronically filed the foregoing with the  
24 Clerk of the Court using the CM/ECF system which will send notification of such filing to the  
following:

19 Chloe H. Kolman  
20 chloe.kolman@usdoj.gov

Sarah Ann Buckley  
sarah.buckley@usdoj.gov

21 /s/ Bryan Hurlbutt  
22 BRYAN HURLBUTT